U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 08 February 2005

BALCA Case Nos.: 2004-INA-34, 2004-INA-61
ETA Case Nos.: P2002-MA-01324867, P2002-01324865

In the Matters of:

STATE STREET BANK,
Employer,

on behalf of

HONG MEI XU,
and

LIYING HUANG,
Aliens.

Appearance: Cathryn MacInnes
Boston, Massachusetts
For the Employer and the Aliens

Certifying Officer: Raimundo Lopez
Boston, Massachusetts

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

This case arises from two applications for labor certification[1] filed by State Street Bank ("the Employer") for the position of Computer Programmer. (AF 96-97).[2] The

[1] Alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

[2] In this decision, AF refers specifically to the Hong Mei Xu Appeal File as representative of the Appeal File in both cases. Similar applications were filed for the Aliens and the issues raised and dealt with by the CO (*ie*., NOF, FD, etc.) in the cases are identical.

following decision is based on the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c). Because the same or substantially similar evidence is relevant and material to each of these appeals, we have consolidated these matters for decision. *See* 29 C.F.R. § 18.11.

STATEMENT OF THE CASE

On September 4, 2001, the Employer filed two applications for labor certification on behalf of the Aliens to fill the position of Computer Programmer. (AF 96-97). The Employer required a Master's degree in Computer Science or a related field or a Bachelor's degree plus five years of experience. The Employer did not have a separate experience requirement. (AF 96).

The Employer originally filed the application as a request for Reduction in Recruitment ("RIR"); however, on January 8, 2003, the Employer withdrew his request for RIR processing and requested that the case be returned to the state workforce agency for supervised recruiting. (AF 86). The matter was remanded to the state agency on January 13, 2003 and recruitment was performed in February and March 2003 (AF 23-84).

On July 24, 2003, the CO issued a Notice of Findings ("NOF"), indicating the intent to deny certification. (AF 20-22). The CO found that the Employer's minimum requirements were not the actual minimum requirements for the position, as the Alien did not possess the required experience. (AF 21). The CO also determined that the Employer unlawfully rejected qualified U.S. workers in violation of 20 C.F.R. § 656.21(b)(6). The CO found that multiple applicants met the Employer's stated requirements but were rejected for not having enough experience with various programs. The CO instructed the Employer to document lawful, job-related reasons for rejection of the applicants. (AF 21-22).

The Employer requested and received an extension of time in which to submit rebuttal. (AF 18-19). On October 2, 2003, the Employer submitted rebuttal. Although the Employer makes reference to the application as a request for RIR, the Employer withdrew this request by letter dated January 8, 2003.[3] The Employer noted that twelve resumes were received in response to the supervised recruitment. The Employer stated that the Alien had the necessary skills prior to being hired and included a letter from a professor for whom the Alien had worked as a research assistant. (AF 9, 16). The Employer stated that the applicants were asked some technical questions; Applicant #1 answered five of twenty questions correctly and Applicant #2 answered three of twenty questions correctly. The Employer noted that the Alien answered fourteen of twenty questions correctly. (AF 9-12). The Employer included a letter from a computer science professor, distinguishing between two computer languages; the letter noted that a programmer fluent in C would not necessarily know how to use C++. (AF 14-15). The Employer used this to bolster the argument that the U.S. applicants were not qualified for the position.

The CO issued a Final Determination on October 24, 2003, denying certification. (AF 5-7). The CO noted that the Employer stated that the applicants were rejected because their test results were below satisfactory and they could not perform the core job duties. The CO found that the applicants met the only minimum requirement, a Master's degree in Computer Science. The Employer never indicated that a test was required as a precursor to hire. As a result, the CO determined that the U.S. applicants were unlawfully rejected. (AF 6-7).

The Employer requested review on November 5, 2003, arguing that an employer is permitted to use a test to determine if seemingly qualified applicants actually possess the skills to perform the job duties. The Employer noted that the CO cannot ignore an employer's interview results merely because a candidate looks qualified on the basis of a

[3] The CO originally issued a NOF on December 20, 2002, questioning the Employer's layoffs within the last six months, under the RIR scheme. The Employer then withdrew the request for RIR processing and the case was remanded for supervised recruitment. Therefore, the Employer's rebuttal responding to the December 2002 NOF is not applicable because the CO did not raise the same issues in the July 2003 NOF.

resume. (AF 3-4). On November 14, 2003, the CO issued an order denying reconsideration and the Employer requested review by BALCA on November 19, 2003. (AF 1-2). The matter was docketed in this Office on January 13, 2004; the record does not reflect that a brief was filed.

DISCUSSION

Twenty C.F.R. § 656.21(b)(6) requires that U.S. workers be rejected solely for lawful, job-related reasons. The employer bears the burden of proof to demonstrate that a U.S. worker was rejected for lawful, job-related reasons. *Cathay Carpet Mills, Inc.,* 1987-INA-161 (Dec. 7, 1988) (*en banc*).

An applicant who meets the employer's minimum stated job requirements is considered qualified based on his or her education and experience. *Fritz Garage*, 1988-INA-98 (Aug. 17, 1988). A test given to applicants is not necessarily unduly restrictive even when the test is not listed as a job requirement on the ETA 750A or in the advertisements. A pre-employment test may be acceptable if the test is designed to determine if the applicant can adequately perform the job duties. *Lee & Family Leather Fashions, Inc.*, 1993-INA-50 (Dec. 21, 1994). However, this is a subjective determination which must be supported by specific facts establishing an objective, detailed basis for the conclusion that the applicant could not perform the job duties. *Id.* An employer's statement that the applicant did not perform well on the test does not satisfy this standard. *United Rehabilitation Service*, 1993-INA-253 (Apr. 13, 1995).

The Employer argues that the purpose of the test was to determine the level of experience of the applicants. The Employer states that the applicants could not perform the job duties if they could not answer the test questions accurately. The Employer cites the *Lee & Family Leather Fashions* case in support of the proposition that tests are allowable to determine whether the applicant can perform the job duties. However, the standard set forth in *Lee & Family* is a subjective determination and must be supported by an objective, detailed basis. The Employer fails to provide this detailed basis.

The Employer includes a letter from the head of its IT department, stating the programs which the applicants would use in the position. (AF 13). The Employer also includes a letter from a professor of computer science, discussing the differences between programming languages and noting that experience in one language does not equate to experience in another language. (AF 14-15). The Employer presents recruitment results for the two applicants at issue. The Employer notes the number of questions each applicant answered correctly for three different programming languages. The Employer also notes that the Alien was given the same test and performed much better. Although the Employer states the number of questions each applicant answered, neither a copy of this test, nor the applicants' actual answers were included. The Employer made a bare assertion that the applicants did not answer enough questions correctly to be considered qualified. The Employer did not state how many correct answers were required; the Alien only answered 50% correct in two of the three areas.

A bare assertion, without supporting documentation, is generally insufficient to carry an employer's burden of proof. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). The Employer has not included any documentation to support the claim that the applicants' performance on the test demonstrated an inability to perform the job duties. The Employer did not require any experience in the job offered, thus the Employer did not require experience with the job duties. The U.S. applicants met the Employer's requirements and the use of the test to justify their rejection does not present a lawful, job-related reason for rejection. Accordingly, the CO properly denied certification.

ORDER

The CO's Final Determination denying labor certification is hereby **AFFIRMED.**

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of Alien
Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.